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No. 73-1836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

JOHN H. LIMBACK,
Plaintiff-Appellant,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education & Welfare,
Defendant-Appellee.

PLAINTIFF-APPELLANT'S PETITION FOR WRIT OF CERTIORARI

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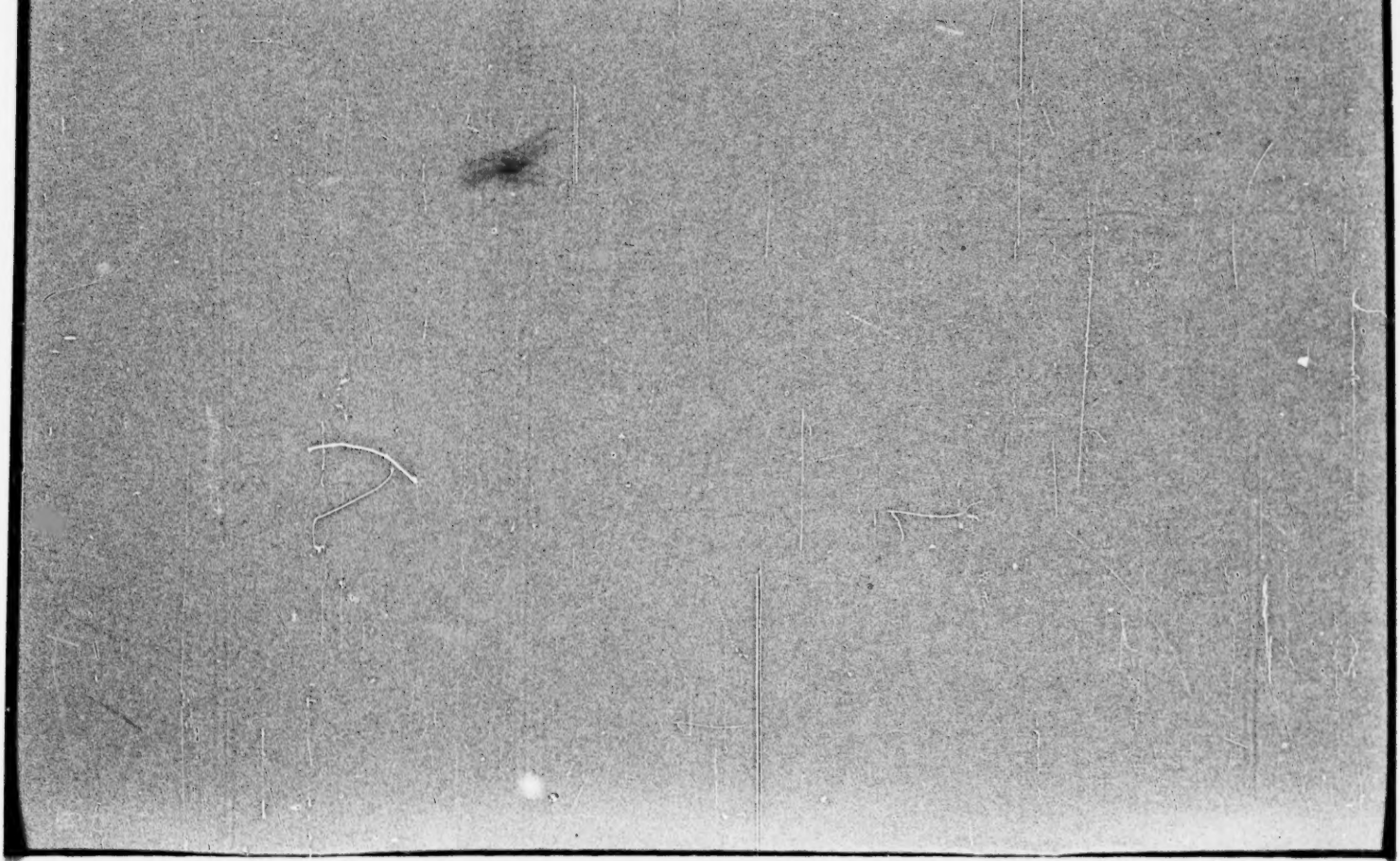

TABLE OF CONTENTS

	Pages
Index to Authorities	ii
Appearance	1
Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below	1
Concise Statement of the Grounds on which Jurisdiction of this Court is Invoked	2
Question Presented for Review	2
Constitutional Provision and Statutes which the Case Involves	2
Concise Statement of the Material Facts of the Case	4
Direct and Concise Argument Amplifying the Reasons Relied Upon for the Writ	6
Petition for Certiorari	17
Opinions and Orders of the Lower Courts	18, 24

INDEX TO AUTHORITIES

Cases Cited

	Pages
Bolling v *Sharpe*, 347 US 497, 74 S Ct 693 (1954)	13
Flemming v *Nestor*, 363 US 603, 80 S Ct 1367 (1960)	6, 9
Lofty v *Richardson*, 440 F2d 1144 (1971)	16
Richardson v *Belcher*, 404 US 78, 92 S Ct 254 (1971)	10-12, 16

Statutes Cited

United States Constitution, Amendment V	2-3, 6
26 USC § 1401 *et. seq.*	6
26 USC § 3101 *et. seq.*	6
42 USC § 401	6
42 USC § 402	6, 15
42 USC § 415	15
42 USC § 423	6
42 USC § 424a	3-4, 7-8
MCLA 418.161; MSA 17.237 (161)	13
MCLA 418.351; MSA 17.237 (351)	14, 15
MCLA 418.355; MSA 17.237 (355)	14, 15

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APPEARANCE

Now comes F. HUBERT MATHER (Of Counsel) of the firm of Wisti & Jaaskelainen, and hereby enters his appearance for and on behalf of the Plaintiff-Appellant in the above-entitled cause and petitions this Court for a writ of certiorari.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

An opinion and order was delivered by the Honorable Noel P. Fox in the above-entitled matter in the District Court of the United States for the Western District of Michigan on September 25, 1973. In his opinion and order, Judge Fox granted a summary judgment against the Plaintiff-Appellant.

On appeal to the United States Court of Appeals for the Sixth Circuit, the summary judgment of the District Court was affirmed in an order by Judges Edwards, Peck, and Engel filed March 12, 1974.

The orders of District Court and Court of Appeals are unofficial and are appended to this petition.

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The date of the order sought to be reviewed, the order of the Sixth Circuit Court of Appeals in regard to the above-entitled matter, is March 12, 1974.

The statutory provision believed to confer jurisdiction on the Supreme Court to review the judgment or decree in question by certiorari is 28 USC § 1254 which provides in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *"

QUESTION PRESENTED FOR REVIEW

WHETHER THE PLAINTIFF-APPELLANT HAS BEEN UNCONSTITUTIONALLY DEPRIVED OF SOCIAL SECURITY BENEFITS BY THE OPERATION OF SECTION 224a OF THE SOCIAL SECURITY ACT.

CONSTITUTIONAL PROVISION AND STATUTES WHICH THE CASE INVOLVES

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 224a of the Social Security Act (42 USC 424a) provides, in relevant part:

"(a) If for any month prior to the month in which an individual attains the age of 62 —

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of —

(3) such total of benefits under section 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of —

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

• • •

"For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income computed without regard to the limitations specified in section 409 (a) and 411 (b) (1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409 (a) and 411 (b) (1) of this title, the Secretary under regulations shall estimate the total of such wages and self-employment income for purposes of clause (B) of the preceding sentence on the basis of such information as may be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations."

CONCISE STATEMENT OF THE MATERIAL FACTS OF THE CASE

From 1942 until 1968, or for a period of twenty-six (26) years, John Limback, the claimant, was employed as a trammer underground in a copper mine.

Mr. Limback has been disabled from undertaking gainful employment since 1968. His disabling condition has been diagnosed as chronic obstructive pulmonary emphysema, chronic bronchitis, and pulmonary osteoarthropathy.

The claimant filed an application for Old Age, Survivors, and Disability Insurance on October 7, 1969. A period of disability for the claimant was established before the Social Security Administration beginning July 15, 1968.

On June 4, 1970, the Social Security Administration informed Mr. Limback that benefits would not be paid to him or his dependents for the period between May, 1970 and April, 1971 because he had received a lump sum settlement of a Workmen's Compensation case in the net amount of Eleven Thousand Four Hundred Seventy-five ($11,475.00) Dollars. This offset was made pursuant to 42 USC § 424a, as amended, which places a limit of eighty (80%) percent of a claimant's average monthly earnings upon the total Social Security and Workmen's Compensation benefits which a claimant may receive.

Mr. Limback has protested this ruling of the Social Security Administration by pursuing his administrative remedies fully before the Hearing Examiner and the Appeals Council.

On May 1, 1972, the claimant requested a review of the decision of the Social Security Administration by bringing a civil action in the Federal District Court for the Western District of Michigan. The Defendant moved for a summary judgment which was granted by the District Court in an opinion and order dated September 25, 1973.

The claimant appealed the judgment of the District Court, but the Sixth Circuit affirmed the District Court in an opinion dated March 12, 1974.

The sole issue now before the Supreme Court is the constitutionality of 42 USC § 424a which provides for an offset of Social Security benefits for persons who have been injured in industrial accidents and, consequently, receive workmen's compensation benefits. The claimant contends that 42 USC § 424a denies his right to due process of law.

The basis for federal jurisdiction in the court of first instance in this matter is 42 USC § 405 (g) which provides for judicial review of Social Security cases pending before the Secretary of Health, Education and Welfare.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR THE WRIT

Except in the instances of a few important groups (such as employees of the United States government and certain domestic and agricultural employees), all persons in the United States who are self-employed or who are wage earners are required by law to contribute tax monies to the Federal Old Age and Survivors Insurance Trust Fund. See the Federal Insurance Contributions Act (26 USC § 3101 *et. seq.*), the Self-Employment Contributions Act of 1954 (26 USC § 1401 *et. seq.*) and § 201 of the Social Security Act (42 USC § 401). The monies contributed to these funds are distributed as Old Age, Survivors, and Disability Insurance Benefits. See § 202 and § 223 of the Social Security Act (42 USC § 402 and § 423).

Thus, the Federal Old Age, Survivors, and Disability Insurance system is conceived on a vast scale and supported by a major segment of our society. Those who contribute to this insurance scheme have no choice in the matter but rather are required to do so by law. Consequently, these contributors, who often have no other form of insurance or are inadequately insured at best, have a considerable stake in the benefits provided by the system. Yet, the Social Security Act, in and of itself, does not provide a guarantee to protect contributors from being eventually disenfranchised as a result of arbitrary governmental action of their right to share in the benefits of the system. Only the United States Constitution provides such a guarantee.

The Fifth Amendment to the United States Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law." The Supreme Court has held that the interest of a covered employee under the Social Security Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. *Flemming* v *Nestor*, 363 US 603, 611, 80 S Ct 1367, 1373 (1960).

In the instant case, the Plaintiff contends that arbitrary governmental action of the sort prohibited by the Due Pro-

cess Clause is embodied in § 224a of the Social Security Act (42 USC § 424a), which provides in relevant part:

"(a) If for any month prior to the month in which an individual attains the age of 62 —

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of —

(3) such total of benefits under section 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of —

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section."

* * *

"For purposes of clause (5), an individual's average current earnings means the larger of (A) the aver-

age monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in section 409 (a) and 411 (b) (1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409 (a) and 411 (b) (1) of this title, the Secretary under regulations shall estimate the total of such wages and self-employment income for purposes of clause (B) of the preceding sentence on the basis of such information as may be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations."

* * *

Section 224a serves to deprive a class of persons of their right to full participation under the Social Security Act — a right which they have earned by their contributions. Men who are disabled in the course of their employment and who receive workmen's compensation suffer an offset of their Social Security disability benefits because of Section 224a. This offset insures that those affected by it will not receive from the state workmen's compensation system and from the Social Security Administration more than an amount which is equal to the greater of the Social Security disability benefits which they would have received had they not been the recipients of workmen's compensation *or* eighty (80%) percent of their "average current earnings" as defined by Section 224a. For several reasons this offset is unjust and inequitable.

Section 224a is unjust because it deprives men and women of insurance benefits which they have earned through their contributions. As Mr. Justice Douglas pointed out in his dissenting opinion in *Flemming* v *Nestor*, 363 US 603, 631-632, 80 S Ct 1367, 1383-1384 (1960):

"Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. See *Social Security Board* v *Nierotko*, 327 US 358, 364, 66 S Ct 637, 640, 90 L Ed 718. The funds are placed in the Federal Old-Age and Survivors Insurance Trust Fund, 42 USC § 401 (a), 42 USCA § 401 (a); and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made. See Stark, Social Security: Its Importance to Lawyers, 43 ABAJ 319, 321 (1957). As the late Senator George, long Chairman of the Senate Finance Committee and one of the authors of the Social Security system, said:

> 'There has developed through the years a feeling both in and out of Congress that the contributory social insurance principle fits our times — that it serves a vital need that cannot be as well served otherwise. It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles — that what is due as a matter of earned right is far better than a gratuity. * * *
>
> * * *
>
> 'Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.' 102 Cong Rec 15110."

Thus, Social Security benefits are a form of insurance. They are not welfare. They should not be viewed as a dole, but rather as a consideration which the federal government is contractually obligated to pay. The government should not be allowed to arbitrarily forsake this obligation even though it gives a policy reason for the repudiation of

this obligation which might seem well-founded on its face but, which, in fact, does not withstand close scrutiny.

The Supreme Court has cited two grounds which might serve as a rational basis for Section 224a in *Richardson* v *Belcher*, 404 US 78, 83, 92 S Ct 254, 258 (1971). The first was that combined state and federal benefits in excess of take-home pay earned prior to disability reduces the incentive of the worker to return to the job and impeded the rehabilitative efforts of the state programs. The second ground was that duplication of benefits might lead to erosion of state workmen's compensation programs. Consequently, the Supreme Court has upheld the constitutionality of Section 224a.

But, to justify a law which treats two groups of persons unequally and which takes from one group a right which they have earned, it should not be enough merely to recite a few legitimate goals as the intended purpose of the law. In addition, there should be some rational relationship between the purposes which the law is intended to serve and the actual effect of the law. Noble purposes may be attributed to any law no matter how arbitrary or offensive to notions of due process that law may be. The true test of whether a law discriminates, but by doing so effects a rational, legitimate purpose, on the one hand, or merely discriminates invidiously, on the other hand, is the actual operation of that law in practice.

In practice, Section 224a achieves no legitimate end. It does not serve to prevent the erosion of state workmen's compensation programs because, as Mr. Justice Marshall indicated in his dissenting opinion in *Belcher*:

> "More pointedly, however, it defies logic to claim that § 224 could to any extent protect or encourage workmen's compensation in the manner suggested by the Court. In support of its claim that § 224 might discourage the erosion of workmen's compensation, the appellant relies heavily on a statement made by a representative of the Council of State Chambers of Commerce to a subcommittee of the Senate Committee on Finance:

> 'A matter of equal concern is the impact of Federal disability payments on State workmen's compensation programs. Legislative proposals have been offered in several States (Colorado, Florida, Maryland, and Minnesota) to reduce workmen's compensation benefits by the amount of (social security) disability benefits payable to a disabled worker. If other States follow this direction * * * we believe it will be only a matter of time until State workmen's compensation programs are destroyed.' Hearings on H.R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess, pt. 1, p. 259.

In addition, the Government refers to the testimony of another Chamber of Commerce representative:

> 'Encroachment by social security is hampering efforts to improve the State workmen's compensation systems where improvements are needed. Faced with sharply rising costs and the duplication of benefits, employers in several States have supported legislative proposals to reduce workmen's compensation benefits by the amount of social security disability benefits.' *Id.*, at 252.

I am unable to see how § 224 is connected to this asserted rationale. The federal offset provision provides for the reduction of *federal* benefits if the total of those benefits and the workmen's compensation benefits exceeds eighty (80%) percent of "average current earnings." However, federal benefits may not be reduced if the workmen's compensation plan provides for a reduction of *its* benefits in the event of an overlap. § 224 (d). Thus, if a State or employers in the State want to save money, the federal statute invites them to reduce workmen's compensation benefits by means of an offset provision of their own. I do not see how it is possible to argue that the federal statute is designed to prevent States from adopting their own offset provisions. If anything, the States are encouraged to cut back on their programs." *Rich-*

ardson v *Belcher*, 404 US 78, 93-94, 92 S Ct 254, 263-264 (1971).

Moreover, Section 224a complicates the practice of Workmen's Compensation law by discouraging settlements between employers and employees in cases where there are disputes over the liability of the employer to pay compensation. Social Security disability benefits, taken together with workmen's compensation benefits, are frequently all the income that a worker has to rely upon in the event of disability. Income from these sources is invariably modest at best. In the absence of Section 224a, a worker who is disabled for life might rely upon his Social Security benefits to maintain himself and his dependents and use a workmen's compensation settlement to pay the mortgage on his home or send his children to college. But Section 224a mandates that Social Security benefits be offset where workmen's compensation settlements are made. Frequently, most or all of a workmen's compensation settlement is eaten away in this manner. Thus, workmen are not encouraged to settle their compensation claims because they have little to lose by not doing so. Thus, settlements which were once mutually beneficial to employees and the employers are discouraged and a heavy burden is placed on both employers and state workmen's compensation systems.

Nor is there any rational basis for the use of Section 224a as a means to encourage rehabilitation. Section 224a affects most severely those workers whose income is very low. These people are often barely able to support themselves on 100% of their "average current earnings". Section 224a insures that those of them who are disabled will never receive more than eighty (80%) percent of this amount. It is not rational to "encourage" people to rehabilitate themselves by starving them or by forcing them to forego ordinary human needs. This kind of "encouragement" affects not only malingerers but also thousands of working men and women who are truly disabled, many of them permanently. It is not rational to punish many in order to "encourage" a few. Yet this is the effect of Section 224a.

In addition to the fact that Section 224a serves no rational purpose, it is also violative of the Federal Government's obligation under the Due Process Clause of the Fifth Amendment to guarantee to all citizens equal protection of the laws. See *Bolling* v *Sharpe*, 347 US 497, 74 S Ct 693. Only those who are disabled and who receive workmen's compensation benefits must suffer an offset of their Social Security disability benefits. Others who receive benefits from collateral sources such as private insurers, the Veteran's Administration, and claims under ordinary tort law, the Federal Employer's Liability Act and the Jones Act do not share this handicap.

To illustrate the arbitrary effect of Section 224a, many examples might be posed.

For instance, two workmen may work side by side at the same job. Their employer may provide workmen's compensation benefits in the case of work-related disability and sickness and accident benefits to cover disability which is not work-related. Suppose that one of the employees is disabled by sickness or an injury which is not work-related. He will receive a full measure of both Social Security disability benefits and sickness and accident benefits with no offset. But if his co-worker sustains a work-related injury, then the co-worker must suffer an offset of his Social Security benefits against his workmen's compensation. Thus, Section 224a is effectively a penalty imposed upon persons whose disability arises out of and in the course of their employment.

Another example of the inconsistency inherent in Section 224a may be found in Section 161 of the Michigan Workmen's Compensation Act (MCLA 418.161; MSA 17.237 (161)) which provides that policemen or firemen may waive the provisions of the Workmen's Compensation Act and elect to be covered by the charter of the municipal corporation which employs them. In this instance, too, Section 224a operates to deprive those who elect to be covered by the workmen's compensation act of all or a part of their Social Security benefits but does not affect those who elect to be covered by some other collateral source of disability benefits.

Section 224a discriminates against workingmen and particularly against poor workingmen. Those persons whose earnings are sufficiently high so that eighty (80%) percent of their "average current earnings" under Section 224a exceeds their total Social Security and workmen's compensation benefits are not affected by the offset of Section 224a. Only those with very low incomes must suffer an offset of their Social Security benefits.

For example, a man covered by the Michigan Workmen's Compensation Act who was disabled in a work-related accident in 1972 and who has three dependents will receive workmen's compensation at the rate of $101 per week or $5252 per year. See MCLA 418.351; MSA 17.237 (351) and MCLA 418.355; MSA 17.237 (355). If the man's "average current earnings" under Section 224a were less than $6565 per year ($5252 ÷ .80 = $6565) then his Social Security benefits will be totally offset as a result of Section 224a. If the man's "average current earnings" under Section 224a were greater than $6565 then he will suffer only a partial offset or perhaps no offset at all if his wage level prior to his disability was sufficiently high.

To illustrate a point at which a workingman suffers no offset, take as an example a man who is injured at work in Michigan in 1972 and who has three dependents. His "computation base years" under the Social Security Act are 1951-1972 if he was 21 years of age or older before 1951. Suppose that the man has been paid the maximum amount of wages creditable for social security purposes in each of these years, so that his creditable wages for the period are: 1951-1954, $3,600 a year; 1955-1958, $4,200 a year; 1959-1965, $4,800 a year; 1966 and 1967, $6,600 a year; and 1968-1971, $7,800 a year. The number of the man's "elapsed years" (21) reduced by 5 is 16. Choosing the 16 highest of the man's creditable years, it can be determined that the total creditable wages paid to him in these years amounted to $90,600. Dividing this figure by 192 (the number of months in 16 years) yields $471 (any fraction of $1 is dropped). Using the table contained in 42 USC § 415, the man's benefit (primary insurance amount) is found to be $259.40. His maximum family benefit, since he has three dependents, is $480 per month.

(These calculations are based on 42 USC § 402 and § 415). Thus, the total disability benefit for the man and his dependants is $480 x 12 = $5760 per year. His workmen's compensation benefits are $101 per week or $5252 per year. See MCLA 418.351; MSA 17.237 (351) and MCLA 418.355; MSA 17.237 (355). His total benefits from workmen's compensation and Social Security are $5760 + $5250 = $11,010 per year if he is not affected by the offset of Section 224a. He will not be affected by the offset of Section 224a if he earns more than $11,010 ÷ .80 = $13,762.50.

Thus, it may be said generally that a man who was disabled in a work-related accident in Michigan in 1972, who has three dependents, and who has been working since 1950 will have his Social Security benefits totally offset if his "average current earnings" over the space of a year are less than $6565 but will not have his Social Security benefits offset at all if his "average current earnings" over the space of a year are more than $13,762.50. If his average current earnings are between these two figures, he will suffer a partial offset which is inversely proportional to his "average current earnings." From these calculations, it is evident that Section 224a is a regressive law which takes from the poor and gives to the rich. Section 224a hardly affects middle class workers who predominate in nation's suburbs, who are well-represented by progressive unions, and who receive income of over $10,000.00 per year. On the other hand, Section 224a generally operates to offset the entire Social Security benefit due to poorer workers who receive workmen's compensation and who predominate in rural areas and the inner city.

The claimant in the instant case, Mr. Limback, is in the latter group. Because his earnings as a copper miner in northern Michigan were always very low (he never earned more than $5100 in any given year — see page 32 of the transcript) the entire amount of his Social Security disability benefits for the period of May, 1970, through April, 1971, was offset against his net workmen's compensation settlement of $11,475.

The bitter irony of this situation is that it is poorer workers who most desperately need Social Security benefits when they become disabled. Middle class workers who

are not affected by the offset will often have collateral sources of disability income through arrangements with private insurers and their employers because they are aware of the inadequacies of Social Security and Workmen's Compensation benefits. But people at lower income levels seldom have the economic wherewithal to insure themselves adequately. Consequently, Old Age, Survivors, and Disability Insurance is their insurance — for them, there is no other. Yet, in spite of their need, Section 224a operates to deprive these poorer workers of this source of income.

In light of *Richardson* v *Belcher*, 404 US 78, 92 S Ct 254 (1971) and *Lofty* v *Richardson*, 440 F2d 1144 (1971), which have upheld the constitutionality of Section 224a and which the Defendant-Appellee will inevitably cite in its reply brief, the claimant's appeal in the instant case must seem a Quixotic venture, indeed. But, just as the old Don was moved by a kind of desperation, so are the claimant and others like him who are adversely affected by Section 224a. Poor people have no lobby of the kind described in the *Lofty* case to tell their side of the story to Congress or to rid themselves of the social injustice wrought by the workmen's compensation offset. They must rely solely upon the safeguards afforded them by the United States Constitution.

Section 224a does not rehabilitate. Section 224a does not prevent the "erosion" of state workmen's compensation laws. All that Section 224a does in its operation is to take badly needed income away from a narrow class of low income working people who have become disabled. No other group of persons covered by the Social Security Act must endure such a disadvantage. Section 224a is discriminatory in its effect and arbitrary in its conception. It deprives persons without due process of law of a right which they have earned.

PETITION FOR CERTIORARI

The Plaintiff respectfully requests from this Court the grant of a writ of certiorari.

Respectfully submitted,

WISTI & JAASKELAINEN

By: (s) F. HUBERT MATHER (*Of Counsel*)
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Dated: May 24, 1974

OPINIONS AND ORDERS OF THE LOWER COURTS

OPINION AND ORDER

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN H. LIMBACK,
Plaintiff,
v. M 35-72 CA

CASPAR W. WEINBERGER,
Secretary of Health, Education
and Welfare,
Defendant.

This is an action pursuant to Section 205(g) of the Social Security Act, 42 USC 405(g), for judicial review of a final decision of the Secretary of Health, Education and Welfare, which affirms prior administrative determinations applying the "workmen's compensation offset" provisions of Section 224 of the Social Security Act, 42 USC 424, against the disability insurance benefits to which plaintiff is entitled (42 USC 423) and against the wife's insurance benefits and the child's insurance benefits to which his wife and children are entitled [42 USC 402(b) and 402 (d)] under the Act.

Defendant has filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact, and that defendant is entitled to a judgment as a matter of law. Plaintiff concedes there is no factual dispute and that the issue is solely one of law.

The facts, briefly stated, are that a period of disability was established for plaintiff beginning July 15, 1968 on the basis of silicosis and related disablying conditions. By notice of June 4, 1970, plaintiff was informed that he was not eligible for benefits for the period May 1970 through April 1971 because he had received a lump sum settlement under the Michigan Workmen's Compensation Act in the net amount of $11,475.00, representing periodic payments of $81.00 per week ($351.00 per month) beginning August 2, 1968, and that therefore total offset against disability insurance benefits ($310.40 per month for the family) in the period May 1970 through April 1971 was required under the provisions of Section 224 of the Social Security Act. Plaintiff does not dispute the accuracy of the mathematical calculations, and stipulated as to their accuracy in the prior administrative proceedings. However, it is the position of the plaintiff that the determination of the secretary is erroneous for two reasons:

(1) Section 224 of the Social Security Act which requires an offset against social security benefits to reflect workmen's compensation payments is unconstitutional in that it violates the equal protection clause and due process clause of the Federal Constitution.

(2) If the offset was proper, it should have been reduced by the amount of medical expense he will be required to pay for the rest of his life.

THE CONSTITUTIONAL QUESTION

The constitutionality of Section 224[1] of the Social Security Act has been specifically upheld by the Supreme

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[1] Section 224 provides, in pertinent part:

"(a) If for any month prior to the month in which an individual attains the age of 62 —

"(1) such an individual is entitled to benefits under section 423 of this title, and

Court of the United States in *Richardson* v. *Belcher,* 404 U.S. 78 (1971), and by the Court of Appeals for the Sixth Circuit in *Lofty* v. *Richardson,* 440 F. 2d 1144 (Sixth Cir. 1971), cert. den. 404 U.S. 985 (1971). Plaintiff, confronted with the authority of *Richardson* v. *Belcher,* supra, simply argues that the rationale of the case is incorrect and that the dissent in the case represents the sounder view. Even if this were so, this court is, of course, bound by the deci-

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[1] (Continued):

"(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

"the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of —

"(3) such total of benefits under sections 423 and 402 of this title for such month, and

"(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

"exceeds the higher of —

"(5) 80 percentum of his 'average current earnings,' . . .

"For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409 (a) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. . . ." 42 U.S.C. Section 424(a).

sions of the highest court in the land and the decisions of its own judicial circuit.

Plaintiff also seeks to avoid the offset provisions of the Act by claiming that Section 224(b) of the Act, 42 U.S.C. 424(b) provides for an offset of a lump-sum workmen's compensation payment which is "a commutation of, or a substitute for, periodic payments," but that the offset provisions do not apply to a redemption settlement under the Michigan Workmen's Compensation Act. The applicable Michigan statute (MSA 17.237 (835), formerly MSA 17.-172) provides for redemption of liability by payment of a lump-sum by agreement of the parties. It also provides for commutation of deferred payments by payment of a lump sum. Although a distinction may be made under Michigan law between a redemption settlement of a disputed liability and a settlement by a way of commutation of periodic payments admittedly due, the net effect is a lump-sum payment. In either event, it is a payment under a workmen's compensation law in discharge of the employer's liability under such law. In either event, the claimant is permitted to accept his total award at one time rather than in the form of periodic payments projected into the future. Thus, it is clearly "a commutation of, or a substitute for, periodic payments."

A similar argument, as here made by the plaintiff, was made and rejected in *Lofty* v. *Cohen*, 325 F. Supp. 285 (E.D., Mich. 1970). The court stated at page 287:

> "Plaintiff's second contention is that the settlement of his workmen's compensation rights was a 'redemption settlement' not a commutation or a substitute for periodic payments within the meaning of 42 U.S.C.A. § 424a(b) * * * The Michigan statute pursuant to which the lump sum award was made clearly contemplates that such a lump sum payment is a substitute for plaintiff's claim for future periodic payments."

This decision was affirmed sub nominee *Lofty* v. *Richardson*, supra.

REDUCTION FOR MEDICAL EXPENSES

Plaintiff also claims that even if an offset for workmen's compensation benefits was proper, there should have been excluded from the offset his anticipated or future medical expenses. Section 404.408(d) of Social Security Administration Regulations No. 4, 20 C.F.R. Section 404.408(d), in force at the time of the Secretary's determination, specified the items to be excluded in determining the workmen's compensation offset to be applied pursuant to Section 224 of the Act, supra. As stated therein, medical, legal, or related expenses paid or incurred in connection with the compensation claim are excluded in determining the offset where they are established by the award comprimise agreement, or the other methods specified. Provision is also made for exclusion of anticipated medical expenses, however, in this respect the regulation provides:

> "Anticipated medical expenses not specified or itemized in the award or compromise agreement will not be excluded."

In the present case, the award showed no specific allocation of any amount as attributable to medical expenses. However, plaintiff claims that nevertheless approximately 41.5% of the amount awarded should be excluded as attributed to medical expenses "because a study was made by the Michigan Department of Commerce indicating that approximately that percentage of the amount expended on Workmen's Compensation during the fiscal years ending June 30, 1963 and 1964 had to cover medical expenses and were not cash benefits" to the claimant (Tr. 41).

Clearly, this estimate based on a general statistical study does not satisfy the requirement of Section 404.408(d) of the regulation that medical expenses not specified in an award, agreement or court order be documented in specific, itemized or otherwise clear and convincing fashion.[2]

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[2] Section 404.408(d) of the regulation was amended subsequent to the administrative determination in this case.

Moreover, the identical argument here made by the plaintiff was rejected in *Lofty* v. *Cohen, supra,* affirmed sub nominee, *Lofty* v. *Richardson, supra.* The court stated at page 291:

> "Lastly is plaintiff's contention that defendant should somehow allocate 41.5 per cent of the workmen's compensation settlement to medical expense and prorate the 58.5 per cent against the Social Security payment. There is just no basis, legal or practical, for such a procedure. It would be contrary to Section 224(b). In addition, there was no breakdown in the Redemption Order indicating that any particular percentage thereof was for medical expenses."

For the reasons above set forth, it is ordered that defendant's motion for summary judgment be granted and the complaint is hereby dismissed.

IT IS SO ORDERED.

Dated: Sept. 25, 1973.

Noel P. Fox
Chief District Judge

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[2] (Continued):

Even if the amended regulation were applicable here, the statistical study upon which plaintiff relies would not meet the proof standards of the amended regulation.

ORDER
(Filed March 12, 1974)

No. 73-2233

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN H. LIMBACK,
Plaintiff-Appellant

vs.

CASPAR W. WEINBERGER
Defendant-Appellee

Before: EDWARDS, PECK and ENGEL, Circuit Judges.

On consideration of an appeal from summary judgment granted in favor of defendant-appellee and noting that the sole issue in this case pertains to appellant's claim that 42 U.S.C. §424(a) is unconstitutional, and further noting that this question has been decided by the U.S. Supreme Court in *Richardson* v. *Belcher*, 404 U.S. 78 (1971), the judgment of the District Court is affirmed under Rule 8 of the Rules of the United States Court of Appeals for the Sixth Circuit.

Entered by Order of the Court

(s) James A. Higgins
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1836

JOHN H. LIMBACK, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY
OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner was awarded Social Security disability benefits beginning in July 1968. By notice of June 1970, he was informed by the Social Security Administration of his ineligibility for receipt of such benefits between May 1970 and April 1971 because he had received a lump sum settlement of $11,475.00 under the Michigan Workmen's Compensation Act. This action was taken pursuant to Section 224 of the Social Security Act, 79 Stat. 406, as amended, 42 U.S.C. 424a, which required the total offset of the workmen's compensation settlement, representing $351.00 per month beginning in August 1968, against the disability insurance benefits of the Limback family of $310.40 per month for the specified period.

After exhausting his administrative remedies, petitioner brought suit in the district court challenging the constitutionality of the offset. Relying on *Richardson* v. *Belcher*, 404 U.S. 78, and *Lofty* v. *Richardson*, 440 F. 2d 1144 (C.A. 6), certiorari denied, 404 U.S. 985, which upheld the constitutionality of Section 224 against a virtually identical challenge, the district court dismissed Limback's complaint (Pet. 18-23). The court of appeals affirmed (Pet. 24).

The decisions of the courts below are correct. Precisely the same issue was raised in *Richardson* v. *Belcher*, *supra*, in which this Court held that Section 224 of the Social Security Act has a rational basis and does not violate the Due Process Clause of the Fifth Amendment. Further review of this issue by this Court is therefore not warranted.

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.